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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1367

ROCKWELL-STANDARD CORPORATION,
Petitioner

v.

SCAIFE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND APPENDIX

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	6
I. The Decision of the Supreme Court Denies the Litigant Its Due Process Right to a Meaningful Review of the Jury's Verdict by the Trial Judge	6
II. The Case Should Be Remanded to the Trial Court for a Statement as to the Reasons for the Finding of Excessiveness	11
Conclusion	13
Appendix	
Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, Smith, Jr., Justice	1a
Opinion of Pennsylvania Supreme Court, Jones, Justice	34a
Dissenting Opinion, Bell, Chief Justice	46a
Petition For Reargument	49a
Order of Pennsylvania Supreme Court	54a

TABLE OF CASES

Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889)	8
Blunt v. Little, 2 Mason 602, Fed. Cas. No. 1,578 (1822)	8
Brotherhood of Locomotive Engineers v. Chicago R.I. & P.R. Co., 382 U.S. 423 (1966)	11

Index.

CASES — PAGE

Burlington Truck Lines v. United States, 371 U.S. 156 (1962) 12
Capital Traction Co. v. Hof, 174 U.S. 1 (1899) 9
Chaunt v. United States, 364 U.S. 350 (1960) 11
Dimick v. Schiedt, 293 U.S. 474 (1935) 7
Duncan v. Louisiana, 391 U.S. 145 (1968) 7
German Alliance Ins. Co. v. Hale, 219 U.S. 307 (1911) 8
Gila Valley, G. & N.R. Co. v. Hall, 232 U.S. 94 (1914) 8
G. E. Herron v. Southern Pacific Co., 283 U.S. 91 (1931) 10
Hook v Turnbull, 6 Call 85 (Va. 1806) 8
Kennon v. Gilmer, 131 U.S. 22 (1889) 8
Koenigsberger v. Richmond Silver Min. Co., 158 U.S. 41 (1895) 8
NLRB v. Metropolitan Life Insurance Company, 380 U.S. 438 (1965) 12
Northern P. R. Co. v. Herbert, 116 U.S. 642 (1886) .. 8
Reid v. Covert, 354 U.S. 1 (1957) 7
Secretary of Agriculture v. United States, 347 U.S. 645 (1954) 12
Southern Railway v. Hattie E. Bennet, 233 U.S. 80 (1913) 9
Wood v. Gunston, 82 Eng. Rep. 869 (K.B. 1655) 8

TEXT BOOKS

W. Blackstone, Commentaries (Lewis's ed. 1903) .. 8

STATUTES

28 U.S.C. §1257(3) 2

CONSTITUTIONS

United States Constitution, Amendment XIV, Section 1 3

IN THE

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October Term, 1972

No. .....

ROCKWELL-STANDARD CORPORATION
Petitioner

v.

SCAIFE COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

Petitioner, Rockwell-Standard Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered in this proceeding on December 20, 1971, in which that Court — the Pennsylvania court of last resort — reversed an order by which the Court of Common Pleas of Allegheny County, Pennsylvania, granted defendant a new trial on the issue of damages.

OPINIONS BELOW

The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, not reported, and the opinion of the Supreme Court of Pennsylvania, ... Pa. ....., 285 A.2d 451, appear in the Appendix hereto.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered December 20, 1971. A timely petition for reargument was denied on January 26, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did the Supreme Court of Pennsylvania deny to a litigant in a civil jury trial an essential element of due process when it deprived the trial court of its traditional power to review the jury's verdict for evidence of jury bias, mistake or prejudice and substituted for this fundamental trial court power, the Supreme Court's own review of the printed record?

STATUTORY PROVISIONS INVOLVED

The provision of the Constitution of the United States which is involved in this case is set forth in Amendment XIV, Section 1 of the United States Constitution, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On June 10, 1960, Respondent, Scaife Company ("Scaife"), filed a Complaint against Rockwell-Standard Corporation ("Rockwell") in Common Pleas Court of Allegheny County, Commonwealth of Pennsylvania. The Complaint alleged, inter alia, that Scaife had been induced to purchase a business from Rockwell by willful and material misrepresentations deliberately addressed to Scaife by Rockwell.

This case was tried before a judge and jury and, after deliberation, the jury returned a verdict for Scaife in the sum of $810,811 principal plus $389,189.28 interest, making a total award of $1,200,000.28.

Rockwell filed motions for judgment *non obstante verdicto* and for a new trial. The trial judge issued an opinion dealing with these motions on August 4, 1969. While denying Rockwell's motion for judgment *non obstante verdicto,* the court held that the jury verdict was excessive and granted Rockwell's motion for a new trial limited to the question of damages unless Scaife should enter a *remittitur damnum* in the sum of $756,001.28. Scaife refused to enter the *remittitur damnum* and, accordingly, an order for a new trial on the damage issue became effective.

Scaife appealed to the Supreme Court of Pennsylvania from the order granting a new trial on the issue of damages, and on December 20, 1971, the Pennsylvania Supreme Court reversed the order granting a new trial and ordered judgment to be entered on the jury verdict.

In its opinion, the Pennsylvania Supreme Court recognized that it had theretofore committed to the discretion of the trial judge the duty of protecting litigants from jury excesses, but held that it would henceforth require a statement of the trial court's reasons for concluding that a jury verdict was "excessive." In this case, in the absence of such a statement, it refused to defer to the trial court's judgment that the jury's verdict was so excessive as to require retrial of the damage issue. Rather than remanding the case for a statement of reasons by the trial court, the Supreme Court itself undertook to review the record, and concluded that there was evidence in the record to support the verdict and, therefore, that the trial court's grant of a new trial was an abuse of discretion.

On December 30, 1971, Rockwell filed a petition for reargument in the Supreme Court of Pennsylvania, in which it argued that it had been denied its due process right of a review of the jury's verdict by the trial court, and that the Supreme Court of Pennsylvania should remand the case to the trial court in order to determine its reasons for a finding of excessiveness. The due process question was timely raised, as it only became an issue upon the rendering of the opinion of the Supreme Court of Pennsylvania. The petition for reargument was denied on January 26, 1972.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Pennsylvania Supreme Court Denies the Litigant Its Due Process Right To a Meaningful Review of the Jury's Verdict By the Trial Judge.

The decision of the Pennsylvania Supreme Court raises an important due process issue relating to the relative roles of the trial court and the appellate court in reviewing a jury verdict in a civil case to determine whether it is excessive. The Pennsylvania Supreme Court has denied to Rockwell the right to have the jury's verdict reviewed by the trial judge, who alone among the judiciary had the opportunity to observe and assess the witnesses at trial.

The Pennsylvania Supreme Court ruled that it was adding "excessiveness" to the list of terms which required explanation by a trial court in granting a new trial. On the grounds that the trial judge in this case failed to present such an explanation for his finding of excessiveness, the State Supreme Court reviewed the record on its own and, finding evidence in support of the jury's verdict, concluded that the trial court had abused its discretion. The practical effect of such procedure was to penalize a *litigant,* Rockwell, because of the failure of the *trial court* to anticipate the Supreme Court's requirement.

In the instant case, the issue of damages was highly contested. The nature of the evidence addressed to damages was such that the trial court's review of the jury's verdict was extremely important to the parties in this case, and the substitution therefor of a review of the

bare printed record by an appellate court denied to Rockwell a fundamental trial right.

In recent years, this court has considered on several occasions the role of the jury and has acknowledged the fundamental importance of the jury trial: *Duncan v. Louisiana,* 391 U.S. 145 (1968); *Reid v. Covert,* 354 U.S. 1 (1957).

An integral part of the system of trial by jury is the traditional responsibility and power of the trial judge to protect a litigant from a jury's mistakes, passions, prejudices, and other improper motives which may result in an excessive verdict. The present case presents an appropriate question for this Court in that the decision below substantially weakens this control over the jury by taking away such power from the trial court and resting it in an appellate court which is far less able to evaluate the jury's performance.

The power of the trial judge to grant a new trial on the issue of damages in the absence of an agreement to a *remittitur* was recognized in the English cases prior to the adoption of the Federal Constitution. See *Dimick v. Schiedt,* 293 U.S. 474 (1935). In fact, judicial control over the jury in the form of ordering a new trial to review excessive damages emerged in the seventeenth century. This control was extended until, by the middle of the 18th century, the power of the courts to grant new trials for all sorts of errors and mistakes on the part of the jury was firmly established.

The power of the trial court judge to grant a new trial was deemed essential to protect litigants against the mistakes, passions, prejudices or other improper motives on the part of the jury.

As BLACKSTONE stated in his COMMENTARIES:

> "The exertion of these superintendent powers . . . in setting aside the verdict of a jury and granting a new trial, on account of misbehavior in the jurors, is of a date extremely ancient. There are instances in the year-books of the reigns of Edward III., Henry IV., and Henry VII., of judgments being stayed . . . because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. And upon these the Chief Justice Glynn in 1655,[1] grounded the first precedent that is reported in our books for granting a new trial upon account of *excessive damages* given by the jury; apprehending, with reason, that notorious partiality in the jurors was a principal species of misbehavior." 3 W. BLACKSTONE, COMMENTARIES 387-388 (Lewis's ed. 1903)

This trial court power was exercised in this country by state trial judges as early as 1806: *Hook v. Turnbull,* 6 Call. 85 (Va. 1806), and was adopted in the federal courts by Judge Story in *Blunt v. Little,* 2 Mason 602, Fed. Cas. No. 1,578 (1822). The Supreme Court has repeatedly recognized this power of the trial judge: *Northern P.R. Co. v. Herbert,* 116 U.S. 642 (1886); *Arkansas Valley Land & Cattle Co. v. Mann.,* 130 U.S. 69 (1889); *Kennon v. Gilmer,* 131 U.S. 22 (1889); *Koenigsberger v. Richmond Silver Min. Co.,* 158 U.S. 41 (1895); *German Alliance Ins. Co. v. Hale,* 219 U.S. 307 (1911); *Gila Valley, G.&N.R. Co. v. Hall,* 232 U.S. 94 (1914).

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1. *Wood v. Guston,* 82 Eng. Rep. 867 (K.B. 1655).

This Court has ruled not only that the function of the trial judge is to secure fundamental fairness to the litigants, but also that the *active participation* of a trial court judge is an essential element of a "trial by jury". Thus, in *Capital Traction Co. v. Hof,* 174 U.S. 1 (1898), this Court stated by Mr. Justice Gray:

> "Trial by jury, in the primary and usual sense of the term at common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an official vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, *in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and . . . to set aside their verdict if in his opinion it is against the law or the evidence."* 174 U.S. 1, 13-14 [Emphasis added].

The importance of the trial court's review of the question of excessiveness was recognized by Mr. Justice Oliver Wendell Holmes in *Southern Railway v. Hattie E. Bennett,* 233 U.S. 80 (1913) where he remarked at p. 86:

> "The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive . . . But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for reexamination here upon a writ of error."

In a trial by jury, the judge is not a "mere moderator", but is the governor of the trial for the purpose

of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the orderly process of law which the Federal Constitution guarantees. *G. E. Herron v. Southern Pacific Co.*, 238 U.S. 91 (1931).

In the instant case, the Supreme Court of Pennsylvania recognized the force of the above authority by noting that the fairness or excessiveness of a verdict is a matter peculiarly within the decisional discretion of the trial court and that the trial court's action thereon cannot be disturbed absent an abuse of discretion or a mistake of law. The Pennsylvania Supreme Court ruled that the trial court's conclusory statements on the issue of excessiveness made it difficult to review the court's decision, and so it added in this case the term "excessive verdict" to a preexisting list of judicial statements which require supporting reasons. The Pennsylvania Supreme Court found that it could not really assess the validity of the trial judge's determination, because he did not offer adequate reasons for his conclusion.[2] In the absence of a statement of supporting reasons, the Pennsylvania Supreme Court undertook to review the record itself and found evidence which it believed supported the jury's verdict.

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2. For example, the Supreme Court speculated that the trial court may have accepted Scaife's argument that certain figures should not have been presented to the jury and, consequently, the verdict was inflated. The Supreme Court commented: 'Perhaps this reasoning was accepted by the trial judge; this, however, we cannot determine for a certainty since no explanation was given." (Fn. 4, p. 11 of Supreme Court Opinion).

Review of a printed record by an appellate court, however, is not an adequate substitute for an evaluation by the trial judge who had the opportunity to observe the witnesses. Indeed, the Pennsylvania Supreme Court acknowledged in the opinion that a ruling on excessiveness is "peculiarly within the discretion of the trial court." This well established common law principle granted to the trial court discretion in an area where it is of critical importance because he alone of the judges reviewing the jury's verdict had an opportunity to observe the witnesses and evaluate all the evidence, both recorded and unrecorded, that was presented during the course of the trial.

II. The Case Should Be Remanded To the Trial Court For a Statement As To the Reasons for the Finding of Excessiveness.

Rockwell was denied an important right by virtue of the trial court's failure to present reasons for its grant of a new trial for the excessiveness of the verdict. The trial court's error may be expeditiously corrected by the simple device of remanding the case to him for a statement of his reasons for a finding of excessiveness.

This Court has consistently refused to pass on questions without knowing the basis of decision by either an administrative agency or the lower court. In the absence of an adequate decision by the appropriate judicial authority, this Court has remanded the matter for a proper statement of the decision. *Chaunt v. United States,* 364 U.S. 350 (1960); *Brotherhood of Locomotive Engineers v. Chicago R.I. & P.R. Co.,* 382 U.S. 423 (1966).

Reasons for Granting the Writ.

This Court has held that the interference with the exercise of discretionary power without a knowledge of the basis for the exercise of such power is "incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines v. United States,* 371 U.S. 156 (1962), *accord, NLRB v. Metropolitan Life Insurance Company,* 380 U.S. 438 (1965). Thus, this Court by Mr. Justice Frankfurter has stated in remanding cases to administrative agencies:

> "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *Secretary of Agriculture v. United States,* 347 U.S. 645, 654 (1954).

Paradoxically, although the Supreme Court of Pennsylvania in the instant case established a rule that a trial judge must state his reasons for a finding of excessiveness, it has refused Rockwell's request that the instant case be remanded to the trial judge for a statement of such reasons, and instead has proceeded to examine the record on its own and render a judgment without the benefit of such reasons.

The decision of the Pennsylvania Supreme Court impairs the integrity of the traditional trial process by infringing a fundamental and essential power heretofore vested in the trial court judge to protect litigants against unfairness and injustice. Thus, the decision operated to deprive Petitioner of his property without due process of law.

CONCLUSION

Review of the decision below is necessary both to protect the Petitioner and to insure the integrity of the trial process by reaffirming the litigant's right to a review of the jury's verdict by the trial judge. A writ of certiorari should accordingly issue to review the judgment and opinion of the Pennsylvania Supreme Court.

Respectfully submitted,

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April 24, 1972.

APPENDIX

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY

SCAIFE COMPANY, a Pennsylvania Corporation, Plaintiff v. ROCKWELL-STANDARD CORPORATION, a Pennsylvania Corporation, Defendant	No. 3342 July Term 1960

Opinion.

(Filed August 4, 1969.)

SMITH, JR., J.

Following a verdict in favor of the plaintiff in the sum of $1,200,000.28,* the defendant filed a motion for a new trial and a motion for judgment *n. o. v.*

The instant action was commenced on June 10, 1960 by the plaintiff filing a complaint captioned "in assumpsit." The complaint contains four separate counts. These counts are based upon the following:

1. The first count is for damages which the plaintiff alleges to have sustained as a result of the defendant's *breach of contract;* and,
2. The second count is for damages which the plaintiff alleged to have sustained as a result

*The verdict of the jury was in two parts: damages, $810,811.00; and, interest, $389,189.28.

of the *breach of warranties* by the defendant; and,

3. The third count is for damages based on the theory that the defendant has been *unjustly enriched* at the expense of the plaintiff; and,

4. The fourth count is for damages which the plaintiff sustained as the result of the defendant deliberately making material representations which were false and which were relied upon by the plaintiff and were the inducing factor in its entering into the contract.

After hearing the evidence of the parties the Court ruled that the plaintiff could not go to the jury on its theories of liability as set forth in the first three counts of the complaint. The propriety of the Court's ruling in this regard has not been raised and is not now before this Court *en banc*. However, the Trial Judge did submit the fourth theory of the plaintiff to the jury and it is on this theory that the jury returned its verdict.

During the Korean War the plaintiff was engaged in the manufacture of bombs and war materials for the government and with the termination of this war effort it decided that it would undertake a new type of manufacturing geared to a peacetime economy. It was with this object in mind that plaintiff entered into negotiation with officers of the defendant in November, 1954.

As the result of a series of mergers the defendant had as a part of its corporate structure what was known as the Timken Silent Automatic (hereinafter TSA) division. This division manufactured and sold through retail outlets heating and cooling equipment primarily for resi-

dential use. In the field of oil fired furnaces the TSA product was considered to be the "Cadillac" of the industry. In the field of the gas fired furnace TSA was already in the market and was attempting to expand in order to cope with and adjust to the change in the industry that was developing in the 1950's. This change was from the traditional oil fired furnace (either the oil fired furnace or the oil converted furnace) to the gas fired furnace and came about with the expansion of the natural gas line facilities into the suburban and rural areas of our country. To paraphrase an expression, *gas was in and oil was out!*

The negotiations between the plaintiff and the defendant which commenced in November, 1954 had as its ultimate objective the sale by Rockwell and the purchase by Scaife of TSA. These negotiations lasted from their inception until they culminated in a formalized contract on March 31, 1955. The negotiations were not carried on as between strangers but as friends who have done business together over the years in a satisfactory manner. The executive heads of Scaife and Rockwell were friends who had known each other over the years; in fact Mr. Scaife's wife was a member of the same family Who Mr. Rockwell testified put him in business many years previously. This position of friendship also extended down into the executive ranks of the two corporations. From the past dealings of the corporations, from the personal and business relationships of their chief executives and officers there was not the "arms-length-dealing" that one would expect to find among individuals or corporations that did not have this relationship. The atmosphere of the "market place" was not present and, therefore, neither was the usual warning sign which

with clarity and effectiveness screams out, *caveat emptor*.

The negotiations between Scaife and Rockwell started out slowly and with a mutual idea of exchanging ideas and probing for facts that were essential to a proper and educated determination. This was particularly true here because Scaife had no experience or knowledge in the field of manufacturing and selling of furnaces while Rockwell had accumulated several decades of experience in this field. After some preliminary meetings Scaife sent to Rockwell a list of questions which Scaife thought of importance in the negotiations. These questions and Rockwell's answers are incorporated herein as Appendix A to this opinion.

The most important single consideration in the mind of Scaife during the whole course of the negotiations, and as it turns out also in the mind of Rockwell, was the quality of the furnace produced and its marketability. Particular emphasis was devoted to the quality and marketability of the *gas* fired furnace because, as both parties agreed, the gas fired furnace was starting to dominate the residential heating business.

In addition to the questions and answers exchanged between the parties, various officers of Scaife discussed the nature of the TSA furnaces with Rockwell officials, they visited the plants of TSA, they examined a survey made for Rockwell called the McKinsey Report, they had an independent analysis firm by the name of Midwest Research Institute visit the plants of Rockwell and submit to it a report dealing with the advisability of purchasing TSA.

As the result of these discussions, a consideration of the reports not only of its own analyst but the McKinsey Report submitted to it by Rockwell, and the limited and restricted inspection of the plants of Rockwell, the management of Scaife came to the conclusion that the TSA division of Rockwell produced a quality product that would be readily marketable and, therefore, they decided to enter into the agreement of March 31, 1955 wherein Scaife agreed to purchase TSA for three million eight hundred thousand ($3,800,000.00) dollars.*

What Scaife didn't know at the time that it entered into the contract of March 31, 1955 was the true nature of the quality of the gas fired furnace. The furnace that was the only hope for expansion and growth in the heating industry, indeed, the only hope to remain competitive in this industry, was seriously defective. The heart of the gas fired furnace is the heat exchanger. The heat exchanger is the object which has as its ultimate purpose the exchange of heat brought about as the result of the combustion of gas within the chamber to heat in the air which flows around about it on the outside and which ultimately flows through the air conduits to warm the home. The TSA heat exchanger was defective in two particulars: first, it made an excessive amount of noise; and, second and more seriously, it cracked. For a Timken Silent Automatic furnace to make noise is one thing but for it to crack is another. Cracking not only impedes and lessens its utility as a heat exchanger but is dangerous to the user in that it permits carbon monoxide to escape from the combustion

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*The actual sum was slightly higher allowing for inventory, etc., adjustments.

chamber and permeate the air which circulates in the home. With a heart so defective the gas fired furnace was not functional and, therefore, not marketable.

Prior to and during the course of these negotiations Scaife was never informed nor did it know the true nature and extent of this defect and the impact that it already had or would have on the marketability of the gas fired furnace. This information was not told the Scaife negotiators nor was it such that they could determine this from the limited opportunity that they had to investigate. On the contrary, Rockwell was fully aware of the defective heart of its gas fired furnace. It possessed this knowledge for some time prior to the negotiations which commenced in November, 1954 and during the period of the negotiations which lasted until March 31, 1955 (the date on which the contract was executed). Moreover, it was informed that the diagnosis was serious and that the prognosis was anything but encouraging. Although possessed of this knowledge not one of the officers of Rockwell saw fit to impart it to Scaife.

The only hint of trouble with the furnace that Scaife had prior to the execution of the contract was a casual remark made to one of its officers by an employee of Rockwell that they had been having trouble with the heat exchanger. The nature of the trouble or the impact that it was having or would have upon the merchantability of the furnace was not mentioned. However, to make sure that this was not a serious problem one of the executive officers of Scaife met with one from Rockwell at the latter's "penthouse" and was assured that this was only one of those problems that one encounters

in the manufacturing business and as such would be worked out.

Nowhere during the course of the negotiations between Scaife and Rockwell did Rockwell tell Scaife the true facts dealing with the defective heat exchanger. Rockwell failed to inform Scaife:

1. That for a considerable period of time prior to the commencement of negotiations the top executive officers knew that the heat exchangers were defective;

2. That the defects in the heat exchangers were so serious that the TSA officials and engineers were unable to find a solution even after many, many months of research and testing;

3. That one of the chief executive officers considered the problem of such magnitude that he ordered the creation of a Heating Committee to study and consider what should be done under the circumstances;

4. That the management of TSA recommended to and the chief executive officers of Rockwell agreed that a reserve be set up of $26,000.00 per month to permit the writing-off the heat exchangers;

5. That the recommendation of the management of TSA that thousands of the heat exchangers be written off at the end of the year 1954 was set aside without any reason;

6. That numerous complaints were received from customers dealing with the defective heat exchangers; and,

7. That Rockwell could no longer compete in the changing heating industry because of the defective heat exchanger which is the heart of a gas fired furnace.

Following a trial which lasted from October 31, 1966 to December 2, 1966 the Court submitted the case to the jury on the fourth count of the plaintiff's complaint which, as we have indicated, was one of fraud and deceit in the inception of the contract. In his charge to the jury the Trial Judge instructed them, *inter alia,* as follows:

> "Now, this is important. When you consider the case you consider, Members of the Jury, that the plaintiff has the burden of proving his case beyond a reasonable doubt. This burden rests with the plaintiff throughout the case. They have the burden of convincing you. Because of the nature of the testimony, and because of the issue which I am going to submit to you, the evidence must be clear, it must be precise, and it must be indubitable. I am going to discuss that with you more fully, but at this point, Members of the Jury, let me say this to you: When you consider the burden of proof, remember that the plaintiff, when he alleges fraud, must establish it by clear and convincing evidence. The fraud must be proved by more than a mere preponderance of the testimony. Nothing short of evidence that is precise, clear, and indubitable can be allowed to overturn a written instrument. The rule on fraud cases, that evidence must be clear, precise and indubitable, means that the witnesses must be credible, must distinctly remember the facts to which they testify, must narrate details exactly, and that evidence must be of such weight as to make out facts alleged beyond a reasonable doubt and thereby enabling the Jury to come to a clear conviction without hesitancy of the clear and precise facts in issue."

"Now, this case, Members of the Jury, is based upon an allegation of what we call in law a fraud or deceit. In other words, the plaintiff is alleging that the defendant did not disclose that of which it had knowledge and which it should have disclosed after an inquiry was made, and that it misrepresented the true facts as they then existed and as they were known to the defendant. This is what you are going to have to determine: From the facts as you find them, was there a misrepresentation fraudulently made which was the inducing factor for the plaintiff to enter into the contract and which the plaintiff justifiably relied upon, and which the defendant knew were false, and then which was the direct and proximate result of the injuries which the plaintiff alleges to have suffered?

Now, this is the crux of it. I am going to instruct you more fully on that, Members of the Jury. One who fraudulently makes a misrepresentation of fact for the purpose of inducing another to act in reliance thereon in a business transaction is liable to the other for the harm caused by his justifiable reliance upon the misrepresentation.

There are various elements of what we call fraudulent misrepresentation. I will discuss those with you. First, there must be a misrepresentation. Now, this could be a positive misrepresentation where the person misrepresents an existing fact knowing it to be false or where he fails to fully disclose something when he is asked to disclose something. There will be another element that I will discuss with you a little bit later dealing with failure to fully disclose certain circumstances, but

at this point I want to say it could be that they don't fully disclose that which they were inquired about or asked of and where they come out and make a statement which was false and they knew it to be false regarding an existing fact.

Now, there must be a fraudulent utterance, and you may find that, Members of the Jury, if you find that from the statements made there was an intent to deceive. A misrepresentation is fraudulently made if the maker knows of its falsity when uttering, stating otherwise. A misrepresentation in a business transaction is fraudulent if the maker knows or believes the matter to be otherwise than as represented.

Now, you must also have another element, Members of the Jury, and that is there must be an intention by the maker—in other words, by the party who makes the statement—that the recipient —in other words, the person who received it—will thereby be induced to act. Now, when you come to consider this, you might consider that an intention on the part of the defendant that the plaintiff be induced by the misrepresentation to act, or refrain from acting in respect to the subject matter, is an important element of this case.

In other words, was the statement made so the plaintiff would do something? In other words, would he enter into the contract based upon his relying upon the statement? Now, of course, there may be other factors involved in inducing him to enter into the contract, but if this was a factor this would be sufficient under the law.

Then you have the element, Members of the Jury, that the recipient—in other words, the plaintiff in this case—must have justifiably relied upon the misrepresentation. This is another important element, and I think that you can determine the relationship of the parties, if that existed, the relationship between the officers, if such was the case, and if you find that the defendant, because of its position as the owner of this division, had peculiar knowledge of the facts relative to the division, and if you find that the plaintiff was not on the same footing, so to speak, as to have the facts for its investigation and for its evaluation, then you may find, along with the other facts in the case, that the plaintiff justifiably relied upon the statements made by the defendant, if such be the case.

The defendant, as the holder and prospective seller, was naturally the proper source of information, and even an independent injury would not likely have produced more than an added confirmation of the defendant's disclosure, whether it be full or not full, but this, Members of the Jury, let me hasten to add, is for your determination and not mine.

Then you come down to the last element of the offense: that the plaintiff's reliance upon the defendant's statement must be the proximate cause of the damage claim. In other words, there must be a direct causal connection between the statements which were made and the damages which the plaintiff complains of. These are the necessary elements of the case, and you are going to have to determine them and weigh them."

* * *

"Now, when you consider the question, consider all the testimony, Members of the Jury, and weigh carefully the theory of the plaintiff, keeping in mind its burden as I have instructed you, and determine was there a misrepresentation by the defendant of a material fact upon which the plaintiff relied, and based upon this reliance had entered into the contract of March the 31, 1955. and which was the direct cause of the injuries which are alleged to have been sustained. If you find this to be the case, then the plaintiff is entitled to a verdict and I so instructed you."

* * *

"Now, I am going to affirm certain points that counsel for the parties have submitted to the Court. I am going to affirm Point 3 of plaintiff's. 'Fraud consists of anything calculated to deceive whether by single act or combination, or by suppression of truth, or a suggestion of what is false, whether it be direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture. It is any artifice by which a person is deceived to his disadvantage.'

5: 'The deliberate non-disclosure of a material fact amounts to culpable misrepresentation no less than does an intentional affirmation of a material falsity.'

6: 'A misrepresentation in a business transaction is fraudulent if the maker knows or believes the matter to be otherwise than as represented.'

'The deceived party is not required to prove that the false representations were the sole induce-

ment for his entering into the transaction. It is sufficient if the misrepresentation was a material factor in inducing him to enter into the transaction.'

In connection with these principles, all of them that I have discussed with you, even if the parties did not stand in a confidential relationship, which would have required the defendant to disclose all material facts which it knew, nevertheless, whether plaintiff's officers directly asked the defendant officers about the nature of the heat exchanger problem, plaintiff was entitled to a complete and truthful answer.

Plaintiff contends defendant's officers, particularly Mr. Queenan, elected to answer the question, and you have heard testimony as to what his answer was. If you find that such answer was not completely candid and frank, but was a half-truth or other type of evasive answer, which threw the plaintiff off guard, it constituted an act of fraudulent concealment. This principle also applies to the answers given to the 26 questions submitted by plaintiff to the defendant; particularly to the first one, and that question was: 'Why is this division for sale? Realizing that this type of business is far removed from the types of business of other divisions of this company, nevertheless it is difficult to understand why this division would be for sale if it is a money-maker and the prospects are encouraging for the future.'

Defendant's reply was answered quite fully by Mr. Enos: 'Radically different from our auto parts business and we don't feel we can devote the atten-

tion it warrants.' When I just mentioned principle, I meant principle of law. I will instruct you when parties are not in a confidential relationship to each other, and are dealing at arms' length, neither party is bound to tell the other party everything he knows. Mere silence, unaccompanied by act of concealment or other deception, is ordinarily neither fraud nor breach of duty. Where one of the parties addresses an inquiry to the other, the person to whom the question is addressed may properly refuse to answer.

If, however, he purports to make an answer, common honesty demands that he do so with candor, and a half-truth or other type of evasive answer which throws the other off guard may constitute active fraudulent concealment.

I think maybe I mentioned this, but I will read them to you: Fraud is never presumed in a case of this nature; the evidence of fraud must be clear, precise, and indubitable; fraud must be proved by more than a mere preponderance of the evidence; to prove fraud, the facts alleged must be established beyond a reasonable doubt.

Members of the Jury, I will instruct you that there are certain circumstances where a party must not be silent upon a material fact within his knowledge, although he stands in no relationship of trust and confidence. If a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relationship exists — and I will say none existed in this case — and he does not state material facts within

his knowledge, the contract will be avoided, for knowingly to permit another to act as though the action was confidential and yet not state material facts is fraudulent. It is said that a party, in such circumstances, is bound to destroy the confidence reposed in him or to state all the facts that such confidence demands.

Now, in the case we have before us there is no confidential relationship existing between Rockwell and Scaife, but if you were to find, Members of the Jury, that Scaife reposed in Rockwell a specific confidence, based upon their superior knowledge of the business and industry, and this imposing of this faith was known to Rockwell, then they would have a duty to make an honest disclosure or a full disclosure of those facts of which it had knowledge and which were relevant to the negotiations which formed a basis for the contract.

Of course, if they didn't want to, then they should take some affirmative action to destroy this faith that the plaintiff would be reposing in them."

In considering the defendant's motion for judgment *n. o. v.* we have reviewed the record and considered it in the light most favorable to the plaintiff, the verdict winner, and have given it the benefit of every reasonable inference of fact arising from the record and have resolved any conflict of the evidence in its favor: *Gillingham v. Patz*, 429 Pa. 308, (1968); *Hay v. B & O Railroad Co.*, 415 Pa. 190, (1964); *Berkelhiser v. DiBartolomeo*, 413 Pa. 158, (1964); *Zilka v. Sanctis Construction, Inc.*, 409 Pa. 396 (1962); and *Bohner v. Eastern Express Inc.*, 405 Pa. 463 (1961). In passing upon the defendant's

motion for new trial we have reviewed the record to see whether the verdict is justified by the evidence presented whether or not there were any prejudicial errors necessitating the granting of a new trial, and whether the verdict was such that it was against the evidence as to shock our judicial conscience.

I. *Liability.*

A. As a matter of law did the plaintiff sustain its burden of proof?

In the case of *Gerfin v. Colonial Smelting & Refining Co., Inc.*, 374 Pa. 66 (1953), cited to us by the defendant, the Pennsylvania Supreme Court stated at page 68 that:

> "Whether the evidence is true is a question of fact . . . but whether it meets the required standard which justifies its submission to the jury . . . is always a question of law . . .": *Aliquippa National Bank v. Harvey, Exrx.*, 340 Pa. 223, 231, 16 A. 2d 409. "How stands the record?"

The Supreme Court went further, at page 72, and expanded on what is the requisite standard of proof in fraud cases. Their opinion states as follows:

> "What is meant by the statement that the evidence must be clear, precise and indubitable? It means that the witnesses must be 'credible, . . . distinctly remember the facts to which they testify, and narrate the details exactly.' (*Leonard v. Coleman*, 273 Pa. 62, 69, 116 A. 550, 552; *Miller's Estate*, 279 Pa. 30, 38, 123 A. 646, 649); that the evidence 'is not only found to be credible, but of such weight and directness as to make out the facts alleged be-

yond a reasonable doubt.' (*Vogel, Administrator, v. Taub,* 316 Pa. 41, 43, 173 A. 270, 271; *Doneyho v. Scottdale Connecting R. R. Co.,* 330 Pa. 207, 209, 199 A. 162, 164); that 'the witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.' (*Broida v. Travelers Insurance Co.,* 316 Pa. 444, 448, 175 A. 492, 494; *Foley, Executor v. Wasserman,* 319 Pa. 420, 424, 179 A. 595, 597; *Aliquippa National Bank v. Harvey, Executrix,* 340 Pa. 223, 232, 16 A. 2d 409, 414; *Tate v. Metropolitan Life Insurance Co.,* 149 Pa. Superior Ct. 558, 562, 27 A. 2d 283, 285). *Cf.* also *Berardini v. Kay,* 326 Pa. 481, 192 A. 882."

The defendant also cites in support of its contention the case of *Laughlin v. McConnel,* 201 Pa. Super. 180, (1963) wherein the Pennsylvania Superior Court stated at page 183 that:

"Fraud must be established by clear and satisfactory evidence, as it is never presumed. *Davis v. Carbon County,* 369 Pa. 322, 85 A. 2d 862; *Pusic v. Salak,* 261 Pa. 512, 104 A. 751. A party who relies on fraud to establish a claim has the burden of proving by clear and convincing evidence the facts upon which the alleged fraud is based. *Bayout v. Bayout,* 373 Pa. 549, 96 A. 2d 876. Fraud must be proved by more than a mere preponderance of evidence. Nothing short of evidence precise, clear, and indubitable

can be allowed to overturn a written instrument. *McCreary v. Edwards,* 113 Pa. Superior Ct. 151, 172 A. 166.

This rule in fraud cases that evidence must be clear, precise, and indubitable, means that witnesses must be credible, must distinctly remember the facts to which they testify, must narrate details exactly, and that evidence must be of such weight as to make out facts alleged beyond a reasonable doubt, thereby enabling the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. *Gerfin v. Colonial Smelting & Refining Company, Inc.,* 374 Pa. 66, 97 A. 2d 71. The oral testimony of one witness which is uncorroborated and unsupported by any other evidence, and which is diametrically opposed by the testimony of another witness, cannot be considered evidence of such weight as to make out a case beyond a reasonable doubt."

With defendant's contention that these cases stand for the appropriate principles of Pennsylvania law we agree. In fact the Trial Judge followed them in his charge to the jury, *supra.*

The defendant does not question that the jury acted improperly in its finding but states that "as a matter of law" the plaintiff failed to meet its burden of proof. With this argument of the defendant we cannot agree! We find that the record amply supports the jury's verdict on the question of liability and that there was more than ample evidence to justify the Trial Judges' submission of this issue to the jury for their determination. In reaching this conclusion we have kept in mind that

fraud is never presumed but, rather, must be proved by clear, precise and indubitable evidence testified to by credible witnesses and that it must possess such weight and directness as to make out the fact alleged beyond a reasonable doubt.

The Pennsylvania Law Encyclopedia, Fraud, Section 2, summarizes the Pennsylvania law dealing with the necessary elements of fraud as follows:

> "The essential elements of actionable fraud consist of, (1) a misrepresentation, (2) a fraudulent utterance thereof, (3) an intention by the maker that the recipient would thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation and (5) damage to the recipient as the proximate result."

This is the rule of law enunciated by the Pennsylvania Supreme Court in the case of *Neuman v. Corn Exchange Natl. Bank and Trust Co.*, 356 Pa. 442 (1947).

Viewing the facts of the instant case in light of law as set forth in the Neuman case, *supra*, we must necessarily arrive at the conclusion that, as a matter of law, the case was one for the jury's consideration.

(a) A misrepresentation?

While it is not our intention to review the facts previously set forth in this opinion we deem it sufficient to state when the record is considered as a whole the conduct of the defendant amounts to a material misrepresentation as to the nature of its Timken Silent Automatic division which it was negotiating to sell to the plaintiff. Defendant painted a picture that the divi-

sion was a healthy body that was functioning well in the heating and cooling field and that it had a bright future particularly in the gas fired field. Great projections were made by defendant of the marketability of TSA's products. But such was not the truth. TSA was in a precarious position because of the defect in the heart of the gas fired furnace, the very type of furnace that was becoming the predominate factor in the heating industry. Although this information was known to the defendant — as we pointed out it had every reason to be and was concerned — it did not make this information known to the plaintiff but in fact concealed it.

Plaintiff was instructed when it was making an examination of the defendant's plant and talking with their employees not to let it be known that they were contemplating purchasing the business nor ask any questions that would show the full extent of their interest. Moreover, the plaintiff was not permitted to go to the defendant's retail sellers and inquire as to the merchantability of the defendant's product. Plaintiff's examination of the TSA division was greatly limited and restricted by the defendant. The area within which they were permitted to inspect was so narrowly limited that as to the merchantability and marketability of the TSA product the plaintiff had to rely on the picture as presented by the defendant. This picture did not accurately represent the true nature of what the parties were bargaining for.

Not to be considered as an isolated factor but one of great importance is the response of the defendant to plaintiff's inquiry about cracking or defects in the heat exchanger the day before the contract was signed. One

of the plaintiff's executives heard from one of its employees that the TSA heat exchanger was defective and he went to the executive head of the defendant and inquired about it. Defendant stated that the problem was not serious, that it was one that is encountered in the manufacturing business and that it could be worked out. The true significance of the trouble was not told to plaintiff. Defendant did not state that the trouble with the heat exchanger was one of long standing, that it existed for about one year and that defendant was unable to find a solution to it, that it was so serious that defendant in the early part of 1954 had set up a Heating Committee with the idea in mind that a concerted effort be made by the TSA division to correct it, that it was recommended that a large amount of the heat exchangers be scrapped and that, among other things, a reserve was established to write off the heat exchangers.

There was sufficient evidence for the Court, as a matter of law, to submit to the jury and to justify the jury's finding that there was a false misrepresentation.

(b) A fraudulent utterance thereof.

The defendant as we have stated and restated in ths opinion painted a false picture of its TSA division to the plaintiff. This painting was done vividly for all of plaintiff's executive officers and personnel to see. It was clearly done willfully because the executive officers of defendant who painted it did so with full knowledge of the true facts as they existed. This is more than adequately demonstrated by the minutes of the defendant's Heating Committee and the letters of its executive officers even without reference to their own oral testimony.

That the misrepresentations were uttered cannot be denied for the contrary has been clearly and precisely proven. Nor can it be denied that they were fraudulent since they were willful.

(c) Intention by the defendant that the plaintiff would be induced to act.

Almost at the inception of the negotiations between the plaintiff and the defendant in November of 1954, the plaintiff asked the defendant a series of questions to which the defendant responded (See Appendix A hereto). The questions were submitted by the plaintiff for the avowed purpose of giving it information on which to make an evaluation as to the advisability of purchasing the TSA division. The answers were given with the intention on the part of the defendant of inducing the plaintiff to act. From this beginning down to the ultimate consummation of the negotiations in the contract of March 31, 1955, the defendant continued to fraudulently utter misrepresentations to induce the plaintiff to act. Other circumstances from which this intention may have been gleaned were: the sterile inspection of the TSA division plants, the restriction of interrogation of retailers, the transmittal to plaintiff of the McKinsey Report which failed to point up the defects in the heat exchangers, the failure to readily state the true nature of the marketability of the furnaces, and many others, while at the same time painting the false picture of hope and prosperity. It was reasonable to assume that the representations of the defendant were uttered for one purpose and one purpose only and that was to induce the plaintiff to execute, as it did, the contract of March 31, 1955.

(d) Justifiable reliance by the plaintiff on the representation of the defendant.

Here, it was evident from the totality of circumstances that in arriving at the decision to enter into the contract of March 31, 1955 the plaintiff relied upon the picture of the TSA division as painted by the defendant. The plaintiff's secretary-treasurer, John Stuart, one of the signatories to the contract, stated that had he known of the true facts that he would not have executed the contract nor would the plaintiff have been a party to it.

Moreover, because of their satisfactory, previous dealings together, the close friendly business relationship between the executive officers of the two companies and the personal friendship between Mr. Scaife and Mr. Rockwell, the plaintiff was justified in its reliance upon the defendant's misrepresentations.

(e) Damage to the plaintiff as the proximate result.

The record shows that as the direct and proximate result of the plaintiff's justifiable reliance on the defendant's misrepresentations that were fraudulently uttered with the intention to induce the plaintiff to act, the plaintiff was damaged. The question of damages is more fully discussed *infra*.

It is our opinion that the evidence in this case amply supports the contention of Scaife that it was damaged as a matter of fraud practiced on it by Rockwell as defined by the Pennsylvania Supreme Court in the case of *Neuman v. Corn Exchange Natl. Bank and Trust Co.*, cited *supra*.

B. Did the Court err in charging the jury that they could consider that Rockwell had a duty of full disclosure of facts which they had knowledge and which were relevant to the negotiations?

In the case of *Zahn v. McMillin,* 179 Pa. 146 (1897) the Pennsylvania Supreme Court stated at page 153 that:

> "If he had been a member of the first association, and had untruthfully represented a material fact to his associates to induce them to part with their interests, that would have been conclusive against him, because of the legal presumption of a confidential relation; but if there was not presumptively a confidential relation, still, was there one in fact, or such relation as warranted them in relying on the truthfulness of his statements? The principle controlling such cases, and deducible from all the authorities, is well stated by Perry on Trusts, vol. 1, p. 179:
>
> 'There are cases where a party must not be silent upon a material fact within his knowledge, although he stands in no relation of trust and confidence . . . If a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the action was confidential, and yet not state material facts, is fraudulent. It is said that a party in such circumstances is bound to destroy the confidence reposed

in him, or to state all the facts that such confidence demands.' "

In the instant case the facts as produced at trial justified the submission to the jury of this issue. The record shows by clear, precise and indubitable evidence that the defendant Rockwell had knowledge of the defect in the heat exchanger and its serious consequences for a long time prior to and during the course of the negotiations. The evidence to support this finding comes not only from the plaintiff's witnesses but from the defendant's. It is not only confirmed by this oral testimony but finds support in the written committee reports of the defendant's Heating Committee as well as correspondence between defendant's executive officers and employees of TSA. Moreover, the record shows that the plaintiff was relying upon Rockwell's superior knowledge in the heating field but also on its experience with and knowledge of the particular heaters which were the subject of negotiation. In light of the record in this case the Trial Judge's charge on this point is more than warranted. The charge being a proper expression of the law under the facts it cannot be considered as error.

C. Did the Court err in submitting the case to the jury on the theory of fraud and deceit?

As we initially noted the plaintiff captioned its complaint as one "in assumpsit." Indeed its first three counts were based upon the contract of March 31, 1955 and justified their having been "in assumpsit," however, the fourth count, the only one submitted to the jury, was clearly one that should be dubbed "in trespass." Defendant contends that we erred when we permitted a joinder of the assumpsit and trespass causes in the same complaint. If this were the case we would agree

with them. However, here the Court on the motion of the defendant refused the plaintiff the right to proceed on the first three counts of the complaint, the assumpsit counts, and only permitted the plaintiff to proceed on and allowed the jury to consider the last count, the trespass count.

Defendant cites to us the case of *Cunningham v. Joseph Horne Co.*, 406 Pa. 1 (1961), for the principle that assumpsit and trespass cannot be joined in the same complaint as alternative remedies and that separate suits must be filed. We do not feel that the principle of this case has been violated inasmuch as the complaint as ultimately considered by the Court and the jury only contained one count.

While it is true the complaint names the cause of action as assumpsit the defendant cannot be heard to complain that it did not know what the facts were upon which the plaintiff was relying and, therefore, was prejudiced. The complaint as fully as if it were one captioned in trespass apprised defendant of the facts sued on. For this reason and the fact that defendant failed to raise this question of improper joinder of causes of action prior to trial we find that defendant has not been prejudiced. We will entertain and allow an application to amend the complaint from one in assumpsit to one in trespass. Amendment of a pleading after trial is in full accord with Pennsylvania Rules of Civil Procedure, Rule 1033, which provides:

> "A party . . . by leave of court, *may at any time* change the form of the action . . . or amend his pleading. * * * An amendment may be made to conform the pleading to the evidence offered or admitted."

In commenting upon this rule Goodrich-Amram states as follows:

> "This form of amendment most frequently arises in cases commenced in assumpsit, which should have been brought in trespass, and vice versa. Because of the differences in the rules of pleading in the two actions, the difference may be material, and the amendment may be a matter of importance.
>
> "Amendment is freely allowed. . . .
>
> "No limit is imposed on the time when the amendment may be made, it has been allowed even after the trial . . ." (Goodrich-Amram, Procedural Rules Service, 1, pages 223, 224 and 225.)

Being of the opinion that the record amply sustains and justifies a verdict for Scaife on the issue of liability we will deny defendant's motions for new trial and judgment *n. o. v.* in this particular.

II. *The Damages.*

Concluding as we have that the defendant's motions for a new trial and judgment *n. o. v.* are without merit as they deal with the question of liability, we must now turn to the question of damages.

In the Trial Judge's charge to the jury, the jury was instructed that in the event the plaintiff was entitled to a verdict on the question of liability that they should compensate the plaintiff for all the legal damages which it sustained as the direct and proximate cause of the defendant's fraudulent misrepresentations. The Court instructed the jury that it should consider: (1) the out-of-pocket damages of the plaintiff; (2) those ex-

penses reasonably incurred in an effort to mitigate any damages which it had sustained; and, (3) interest under certain circumstances. As we previously noted the jury returned a verdict of damages generally of $810,-811.00 and a separate amount of $389,189.29 for interest. It is the contention of the defendant that this verdict should be set aside and a new trial granted.

A. *The question of damages generally:*

(1) *Out-of-pocket loss*

As a result of what the jury presumably found to be fraudulent misrepresentations by the defendant the plaintiff was induced to and did enter into the agreement of March 31, 1955. According to this agreement the plaintiff purchased for the total consideration of $3,749,-827.54 a part of the defendant's corporate structure known as the Timken Silent Automatic division. This division of the defendant was sold and purchased as a distinct and going business. It is clear that what the plaintiff intended to buy and what the defendant intended to sell was a going business, with all that that denotes, and not merely the assets of the division. In fact it was in the contemplation of the parties that the division, lock, stock and personnel would remain together and be taken over as one by the plaintiff. Scaife invited the key personnel to TSA to Pittsburgh to visit their home office and to view and examine its plant at Oakmont, Pennsylvania. Many of the employees were offered substantial raises in pay to make the move to the Pittsburgh area and to stay on with the TSA. Moreover, the retail outlets of TSA were to remain with Scaife as the new purchaser. What the parties intended was that on April 1, 1955, Scaife would be the new

owner of TSA and in all other respects the business would continue to operate.

The Trial Judge charged the jury that one of the elements of damages that they should consider was the out-of-pocket damages that the plaintiff sustained. In other words the difference between what the plaintiff paid for the business and what it was worth. We feel that this is the proper measure of damages and is in accordance with the rule of the Pennsylvania Supreme Court enunciated as far back as the case of *Browning v. Rodman,* 268 Pa. 575 (1920), and as recently as in the case of *Tilghman v. Dollenberg,* 418 Pa. 604 (1965). In the *Dollenberg* case the Pennsylvania Supreme Court speaking through Mr. Justice O'Brien stated the rule as follows:

> ". . . the difference between the real value of the property purchased at the time of the sale and what was paid for it . . ." (418 Pa. 604, 610).

In the instant case the plaintiff purchased the TSA business for $3,749,827.54 and the damages to the plaintiff would be the difference between that amount and the actual value of the business as purchased by the plaintiff.

At the outset it is important to note that the Trial Judge did not allow nor should the jury have been permitted to consider the question of loss of profits.

In determining the out-of-pocket damages of the plaintiff it would be proper for the jury to treat TSA as a going concern and to consider the following factors.

The value of the equipment in accordance with inventory value as contrasted with its actual value. In this case the plaintiff agreed that the inventory value of the

equipment purchased (such as the heat exchangers) would be used in order to arrive at the final purchase price. Plaintiff contended and offered evidence to substantiate its contention that some of the equipment was of no value (or at most scrap value). The difference between these two would be a proper factor to consider in answering the main question.

Another factor that would be a proper consideration in this regard is the effect that the defective heat exchangers and the consequential defective gas fired furnaces would have on the goodwill not only of the gas fired furnaces but of all the products of TSA.

The fact that there was a large number of complaints about the noise that installed gas fired furnaces were making is a proper factor to consider because, as it has been shown, this is not only a factor that goes generally to the goodwill of the business but to the ability to maintain TSA retail outlets.

While it is true that a verdict cannot be the result of speculation and conjecture it need not in a case such as this be capable of ascertainment with mathematical exactness. There are in this case as in many a trespass case areas of damages which can be presented only in general terms and where the final determination thereof is properly a matter for the jury. Thus it is with the question of the value of what did the plaintiff receive for the $3,749,827.54 which it paid to the defendant?

(2) *Mitigating Damages.*

It is hornbook law that when a person has been wrongfully damaged by the tortuous conduct of another that he must act reasonably under the circumstances to

mitigate the damages which naturally flow from such conduct. This the plaintiff attempted to do. Once it became aware of the significance of the defective heat exchangers to the new business which it purchased it proceeded to take steps to correct the defect and, thus, to lessen the consequential damages that such defect caused. Scaife's conduct in this regard consisted, *inter alia,* of retaining the services of Dr. Anthony, Doctor of Science from the Mellon Institute, to conduct a scientific study and evaluation of the problem, the scrapping of unsafe exchangers, testing and retesting of different structural designs and an in-the-field investigation of installed furnaces. The question of what was reasonable to mitigate the plaintiff's damages was submitted to the jury for their consideration. While this is not an element of damages which is subject to determination with mathematical certainty it is one, which based upon the record in this case, was properly submitted to the jury.

B. *Interest.*

As we have indicated the Trial Judge submitted to the jury the question of whether or not the plaintiff should be awarded interest on its claim on what we find to be proper instructions and, inasmuch as defendant does not argue that this was error, we will not discuss it.

C. *The excessiveness of the verdict.*

In an action for fraudulent misrepresentations damages do not have to be proven with certainty. It is sufficient if there is presented proper evidence from which the jury may reasonably find the amount of the plaintiff's harm. In the instant case it is conceivable that plaintiff suffered a legally compensable harm in excess

of the verdict but it has failed to produce competent evidence to prove this. Based on the record which we have before us we are of the opinion that the jury's verdict is excessive. We do not feel that an examination of the record in a light most favorable to the plaintiff would justify a verdict in plaintiff's favor for more than $300,000.00 plus interest in the amount of $143,999.00. Because we find the verdict to be excessive we are going to order a new trial limited to the issue of damages unless the plaintiff within thirty (30) days of this opinion and the accompanying order enters a remittitur damnum with the Prothonotary of this County in the sum of $756,001,28.

D. *Admission of Evidence.*

The defendant in its argument and in its brief contended that the Court erred in admitting into evidence the limited portions of Plaintiff's Exhibits 64 and 69 and permitting the jury to consider them in the course of their deliberation on the question of damages. We have considered the arguments presented by the defendant in this particular and feel that they are without merit. While we do not disagree with the principles contained in the authorities cited to us by the defendant, we feel that in light of the evidence and the Court's ruling that they are inapplicable.

It is the opinion of the Court *en banc* that the defendant's contentions in this particular are without merit and the admission into evidence of the limited portions of Plaintiff's Exhibits 64 and 69 were not prejudicial error necessitating the granting of a new trial.

ORDER OF COURT

AND NOW, to-wit, this 4th day of August, 1969, in accordance with the foregoing opinion it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. That the motion of the defendant, Rockwell-Standard Corporation, for judgment *n. o. v. is* hereby DENIED; and,

2. That the motion of the defendant, Rockwell-Standard Corporation, for a new trial *n. o. v.* is herby DENIED insofar as it relates to the question of liability of the defendant to the plaintiff in the within case; and,

3. That the defendant's motion for a new trial insofar as it relates to the question of damages be and the same is hereby GRANTED unless the plaintiff causes to be entered on the record in the Office of the Prothonotary of this County a remittitur damnum in the sum of $756,001.28 within thirty (30) days from the date of this order.

BY THE COURT:
R. H. S., JR.

[538]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SCAIFE COMPANY, a Pennsylvania corporation, Appellant in No. 43 v. ROCKWELL-STANDARD CORPORATION, a Pennsylvania corporation, Appellant in No. 41	Nos. 41 and 43 March Term, 1970

Appeals from Order of August 4, 1969, and Order of September 4, 1969, Amending Order of August 4, 1969, of Court of Common Pleas of Allegheny County, Civil Division, No. 3342, July Term, 1960.

Opinion

JONES, J. Filed: December 20, 1971

Following a trial by jury, a verdict was rendered in favor of Scaife Company (plaintiff below and appellant in No. 43, March Term, 1970) and against Rockwell-Standard Corporation (defendant below and appellant in No. 41, March Term, 1970) in the amount of $1,200,000.28.[1] While the court en banc denied Rockwell's motions for judgment n.o.v. and for a new trial, a new trial on the issue of damages was ordered unless Scaife filed a remittitur damnum in the amount of $756,001.28. Upon Scaife's failure to file this remittitur, the court below

1. The jury awarded damages of $810,811.00, and interest of $389,189.28.

ordered a new trial limited solely to the question of damages and these cross appeals followed.

A narration of the factual background of these appeals begins with Rockwell's merger on October 30, 1953, with the Timkin-Detroit Axle Company and the concomitant acquisition of the Timkin Silent Automatic (hereinafter TSA) division as a part of Rockwell's corporate structure. Although the TSA product was long considered the best in the oil-fired furnace industry, this type of business was far removed from Rockwell's chief concern, the manufacture of automotive parts. Moreover, reflecting the improvement and expansion of natural gas line facilities in the United States, the fuel furnace industry was drastically changing from oil-fired furnaces to natural gas-fired furnaces. Attempting to meet the challenge of its competitors, TSA developed and marketed its own gas-fired furnace.

Besides this factual discussion, an explanation of the mechanical operation of a gas-fired furnace is necessary. The key component of a gas-fired furnace, simple but indispensable, is the heat exchanger. However, the TSA heat exchanger was defective in two respects: it was noisy and it cracked. As best stated by the court below, [f]or a Timkin Silent Automatic furnace to make noise is one thing but for it to crack is another." For this reason the TSA gas-fired furnace was not functional and, therefore, not marketable.

Although it is a matter of some dispute whether Rockwell or Scaife initiated negotiations for the sale and purchase of the TSA division, negotiations did commence in the Fall of 1954. Reviewing the record, one fact is abundantly clear: Rockwell was very much aware of the defective condition of its heat exchanger and the

effect of this defective component on the marketability of its final product. Besides numerous complaints by customers, Rockwell's cognizance of this problem is demonstrated, *inter alia,* by (1) its creation of a Heating Committee to scrutinize the situation; (2) its unavailing, trial-and-error method of improvement; and (3) Rockwell's establishment of an accounting reserve of $26,000.00 per month to permit the writing-off of the heat exchangers. To capsulize the controversy, Scaife allegedly knew none of these facts when the contract for the sale of the TSA division was executed on March 31, 1955.

For a period of many months, no allegation of fraud was pressed by Scaife and Scaife successfully developed a new type of heat exchanger. However, claiming that damage was already done, a complaint employing four theories of recovery was filed by Scaife. After receiving the evidence, the trial judge ruled that Scaife could go to the jury on only one of these theories: fraudulent misrepresentation.[2] At this point we deem it wise to separate our discussion of these appeals.

No. 41, March Term, 1970

The primary issue of this appeal by Rockwell is whether there is sufficient evidence of fraudulent misrepresentation to justify the jury's verdict. Of course, if the evidence does not establish Rockwell's liability, we need not reach the issue presented by Scaife's appeal,

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2. The three other theories were breach of contract, breach of warranties and unjust enrichment. The trial judge's rejection of these theories was not assigned as error before either the court en banc or this Court. Hence we will not consider this point.

No. 43, arch Term, 1970, concerning the amount of damages.

Summarizing the essential elements of this cause of action, Mr. Justice (later Chief Justice) Jones in *Neuman v. Corn Exchange Nat. Bank and Trust Co.*, 356 Pa. 442, 450, 51 A. 2d 759, 763 (1947), stated, "there must be (1) a misrepresentation, (2) a fradulent utterance thereof, (3) an intention by the maker that the recipient will thereby be induced to the act, (4) justifiable reliance by the recipient upon the misrepresentation and (5) damage to the recipient as the proximate result." *Accord, Eden Roc Country Club v. Mullhauser*, 416 Pa. 61, 204 A. 2d 465 (1964); *Savitz v. Weinstein*, 395 Pa. 173, 149 A. 2d 110 (1959). Concerning the proof of fraud, our cases have consistently enunciated a very high standard. *E.g., Yoo Hoo Bottling Co., Inc. v. Leibowitz*, 432 Pa. 117, 247 A. 2d 469 (1968) ("clear, precise and convincing"); *Gerfin v. Colonial Smelting and Refining Co., Inc.*, 374 Pa. 66, 97 A. 2d 71 (1953) ("clear, precise and indubitable"); *New York Life Ins. Co. v. Brandwene*, 316 Pa. 218, 172 Atl. 669 (1934) "clear and satisfactory"). The question then becomes whether Scaife's proof of every element met this exacting standard.

Combining the first and second criteria, we must examine whether a fraudulent misrepresentation was uttered. Initially, we not that a fraudulent misrepresentation can take many forms: " 'fraud consists in anything calculated to deceive, whether by single act or combination, or by suppression of truth, or a suggestion of what is false, whether it be direct falsehood or by innuendo, by speech or silence, word of mouth, of look or gesture. It is any artifice by which a person is

deceived to his disadvantage': [citation omitted]." *Reichert Estate,* 356 Pa. 269, 274, 51 A. 2d 615, 617 (1947). Besides our previous recitation of the facts, additional evidence in this regard, both documentary and testimonial, are very pertinent.

First, during the negotiations, Scaife submitted twenty-six questions to Rockwell concerning the TSA division, including, *inter alia*: "why is this division for sale" and "what reasons for declining sales volume and faster decline of profits for recent years." Despite Rockwell's awareness of the defective heat exchanger, no mention was made of this factor. Second, Scaife was not permitted to question TS's engineers and retail dealers during the negotiations. Third, testimony by various Scaife executives, if believed, indicated that any hint of trouble was excused by Rockwell officials as minor problems encountered daily by manufacturers. In light of the enormity of TSA's problem, we cannot reject the jury's implicit finding that Rockwell either deliberately evaded or actively concealed the true situation. Overall, we share the opinion of the court en banc that, "there was sufficient evidence for the Court, as a matter of law to submit to the jury and to justify the jury's finding that there was a false misrepresentation."

The third element—an intention by the maker that the recipient would thereby be induced to act—is easily satisfied. The rosy picture painted by Rockwell during the course of the negotiations, coupled with Rockwell's failure to disclose the malfunctioning of its heat exchanger, clearly supports the jury's verdict.

Although neither party has specifically focused its argument on the fourth criterion—justifiable reliance —it is evident from the facts stressed by each side that

the crux of the legal controversy concerns this issue. Relying heavily on *Emery v. Third Nat'l Bank,* 308 Pa. 504, 162 Atl. 281 (1932), Rockwell principally argues that Scaife knew or should have known of the defective heat exchanger and that any damage was essentially self-inflicted. On the other hand, one major facet of Scaife's position, discussed by the court in its charge, is that the long-standing business and personal relationship between the executives of each corporation, while not attaining the legalistic stature of a "confidential relationship," could justify a factual finding that Scaife reposed a specific confidence in Rockwell which was knowingly abused by Rockwell.

In *Emery,* this Court stated:

> "A misrepresentation as to the subject of a proposed sale will not support an action for deceit if the subject be open to the buyer's observation. In Mahaffey v. Ferguson, 156 Pa. 156, 169, 27 A. 21, this court quoted approvingly the statement of Chancellor Kent, Commentaries, 2d volume 494-5, that the law does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. The same opinion quotes from Slaurhter v. Gerson, 13 Wallace 379, as follows: "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations.' This court has

consistently adhered to these principles. [Citations omitted]."

308 Pa. at 511-12, 162 Atl. at 283. Utilizing this concept, Rockwell accentuates certain facts: (1) several market- and engineering reports indicated TSA's sluggish entry into the gas furnace market; (2) Scaife executives had, at least, a glimmering of this problem; and (3) Dr. Anthony, a metallurgical engineer employed by the Mellon Institute, testified that it would be obvious from an inspection of the heat exchanger testing room (a Scaife official and Scaife's chief engineer had toured one of these rooms) that the heat exchanger was defective. However, the evidence introduced by Scaife repudiated each of these allegations. Owing to this extremely close, factual controversy occasioned by our rigorous standard of review as well as the possibility of a specific confidence reposed by Scaife in Rockwell, we believe the trial judge did not err in allowing this case to go to the jury and that the jury's verdict is sufficiently suported by the evidence.

On these facts, there is undisputed evidence of continuous, business transactions between the corporations. Moreover, close, personal relationships existed between the executives of both companies. Of course, Rockwell contends that familiarity and personal relationships did not influence this business transaction. Accordingly, the trial judge, correctly employing this Court's language in *Zahn v. McMillin,* 179 Pa. 146, 153, 36 Atl. 188, 189-90 (1897), stated in his charge to the jury: ". . . there are certain circumstances where a party must not be silent upon a material fact within his knowledge, although he stands in no relationship of trust and con-

fidence. If a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relationship exists — and I will say that none existed in this case — and he does not state material facts within his knowledge, the contract will be avoided, for knowingly to permit another to act as though the action were confidential and yet not state material facts is fraudulent. It is said that a party, in such circumstances, is bound to destroy the confidence reposed in him or to state all the facts that such confidence demands." *See, also, Restatement of Torts* § 542 (1938). Thus, the jury could have concluded that Rockwell knowingly abused Scaife's confidence which would further justify Scaife's reliance.

Having established each of the above elements of this cause of action, there is no question of proximately caused damages other than the extent thereof. On balance, we are of the opinion that Scaife introduced clear and satisfactory evidence upon which the jury determined that Scaife was the victim of Rockwell's fraudulent misrepresentation.

Rockwell next argues that Scaife's failure to complain or give notice of any breach for a period of nineteen months after the corporate takeover constitutes a waiver of any recovery.[3] "The affirmance of a contract induced by fraud of the seller does not extinguish the right of the purchaser, and it is not a waiver of the fraud, nor does it bar the right of the purchaser to recover damages for the fraud. [Citations omitted]." *Tilghman v. Dollenberg,* 418 Pa. 604, 610, 213 A. 2d 324, 327 (1965). "Affirmance of the contract is not a waiver of the fraud; nor does it bar the right to recover; it does

bar a subsequent recission." *Miller v. Central Trust & Savings Co.*, 285 Pa. 472, 486, 132 Atl. 579, 584 (1926). *See, also, Emery v. Third Nat'l Bank*, 314 Pa. 544, 171 Atl. 881 (1934). Accordingly, Scaife could affirm the contract and yet maintain this action for fraud.

No. 43, March Term, 1970

As noted earlier, Scaife's appeal questions the propriety of the new trial ordered by the court en banc limited to the issues of damages because of its conclusion that the verdict was excessive and Scaife's failure to file the required remittitur. Stated differently, the narrow issue presented is whether the combined award of $1,200,000.28, damages plus interest, is excessive.

In this area of law we begin with the well-recognized principle that the grant or refusal of a new trial because of the excessiveness of the verdict is peculiarly within the discretion of the trial court and will not be reversed unless an abuse of discretion or an error of law has been committed. *See, e.g., Murphy v. Taylor*, 440 Pa. 186, 269 A. 2d 486 (1970); *Connolly v. Philadelphia Transp. Co.*, 420 Pa. 280, 216 A. 2d 60 (1966); *Guzman v. Bloom*, 413 Pa. 576, 198 A. 2d 499 (1964). Recognizing the difficult task encountered by an appellate court in reviewing the record when a trial court merely assigns

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3. Rockwell's argument is primarily based on Section 2-607(3) of the Uniform Commercial Code, Act of April 6, 1953, P. L. 3, § 2-607(3), 12A P. S. §2-607(3). Since the jury's verdict was based on fraudulent misrepresentation and not on any theory involving the Uniform Commercial Code, Section 2-607(3) is inapplicable. However, as hereinafter noted in our textual discussion, a similar, common law concept exists.

conclusory statements — "interests of justice," "shocks the court's conscience" and "substantial justice" — we have attempted to discharge this practice. *See, Gilligan v. Shaw,* 441 Pa. 305, 272 A. 2d 462 (1971); *Hilliard v. Anderson,* 440 Pa. 625, 271 A. 2d 227 (1970); *Kralik v. Cromwell,* 435 Pa. 613, 258 A. 2d 654 (1969); *Beal v. Reading Co.,* 370 Pa. 45, 87 A. 2d 214 (1952); *Bellettiere v. Philadelphia,* 367 Pa. 638, 81 A. 2d 857 (1951). In *Hilliard,* the defendant was granted a new trial upon the plaintiff's failure to file a remittitur solely because "the verdict was excessive and shocked the conscience of the court." Primarily concerned with the "shock the conscience" test, we noted, "[t]he court should state the reasons for this conclusion in order that we may have the opportunity of intelligently determining if an abuse of discretion occurred." 440 Pa. at 628, 271 A. 2d at 229. We now add the "excessive verdict" conclusion to that list of judicial statements requiring additional, supporting reasons. *See Spangler v. Helm's New York-Pittsburgh Motor Express,* 396 Pa. 482, 153 A. 2d 490 (1959).

Relying on language in past decisions of this Court, Rockwell contends that the *sole* measure of damages in a case of this nature is the difference between the consideration paid for the property and its true market value, as of the date of the sale. *See, Tilghman v. Dollenberg,* 418 Pa. 604, 213 A. 2d 324 (1965); *Neuman v. Corn Exchange Nat. Bank and Trust Co.,* 356 Pa. 442, 51 A. 2d 759 (1947). *See, also, Restatement of Torts* § 549a (1938). Accordingly, Rockwell contends that Scaife's proof of its operating cost which included expenses required to produce and market the TSA product inflated the jury's verdict, whereas these figures should not have

been presented to the jury.[4] Since Scaife's evidence greatly exceeded the jury's verdict, we believe the trial judge abused his discretion in ordering a new trial after Scaife failed to file the required remittitur. We realize, however, that our conclusion begs the question whether Scaife's expenses and losses are includable in assessing damages.[5]

Initially, we recognize the position taken by many jurisdictions that losses and expenses incurred by the defrauded party as a proximate result of the fraud may be recovered. *See,* 37 C. J. S. *Fraud* § 141 (1943); *Restatement of Torts* § 549 b (1938). Moreover, we noted in *Neuman* that, "[w]hile formulated rules relating to the appropriate measure of damages in varying circumstances have to some extent become fixed, they

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4. Perhaps this reasoning was accepted by the trial judge; this, however, we cannot determine with certainty since no explanation was given. Nor can we make this determination from the jury's verdict since Scaife's suggestion, prior to the court's charge, that the jury be instructed to itemize its verdict was rejected as untimely by both Rockwell and the trial judge.

5. Rockwell also contends that the evidence presented by Scaife — prepared summaries of Scaife's voluminous business records — was inadmissible under the rules of evidence. Although the documents were available to Rockwell for several years prior to trial, no attempt was made to inspect these records until trial. Unfortunately, portions of this original mass of material were destroyed. Owing to this partial destruction as well as the sheer volume of these records, Scaife only introduced summaries. We do not believe this was error. *See,* IV Wigmore on Evidence § 1230 (3d ed. 1940). Even if there was error, there was no reversible error since Scaife's supporting witnesses were extensively cross-examined on these figures.

are by no means immutable but bend to the exigencies of the particular case in order that just compensation may be ascertained and awarded." 356 Pa. at 457, 51 A. 2d at 766. Considering the demise of the oil-fired furnace industry, the steps taken by Scaife and the expenses thereby incurred to correct the defective heat exchanger can be fully justified as sound business practice and were proximately caused by Rockwell's misrepresentation. Additionally, Scaife's operating losses may not be equated with the "benefit of the bargain" rule prohibited in *Neuman;* whether all of these losses were proximately caused by Rockwell's fraud is, of course, a question for the jury. In short, to apply the measure of damages formula discussed in *Tilghman* to the sale of a "defective" business would work a grave injustice. It is our opinion that the jury's verdict is fully supported by the evidence and should be reinstated.

Judgment, as modified, is affirmed. The record is remanded with instructions to reinstate the jury's verdict.

Mr. Justice Cohen did not participate in the decision of this case.

Mr. Justice Pomeroy did not participate in the consideration or decision of this case.

Mr. Chief Justice Bell filed a dissenting opinion.

[538]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SCAIFE COMPANY, a Pennsylvania corporation, Appellant in No. 43 v. ROCKWELL-STANDARD CORPORATION, a Pennsylvania corporation, Appelant in No. 41	Nos. 41 and 43 March Term, 1970

Appeals from Order of August 4, 1969, and Order of September 4, 1969, Amending Order of August 4, 1969, of Court of Common Pleas of Allegheny County, Civil Division, No. 3342, July Term, 1960.

Dissenting Opinion

BELL, C. J. Filed: December 20, 1971

The lower Court granted a new trial to Rockwell-Standard Corporation limited to the issue of damages because the verdict was excessive. Our Court reverses and reinstates the jury's verdict because "the jury's verdict is fully supported by the evidence." Furthermore, this Court for the first time in its history requires the trial Judge (or lower Court) to state his (or its) reasons why he (or it) believes the verdict was excessive.

We all agree with the well-recognized principle that the grant or refusal of a new trial because of the excessiveness of the verdict is peculiarly within the discre-

tion of the trial Court, and will not be reversed unless there is an abuse of discretion or an error of law which controlled the outcome of the case. *Connolly v. Phila. Trans. Co.*, 420 Pa. 280, 216 A. 2d 60; *Guzman v. Bloom*, 413 Pa. 576, 198 A. 2d 499; *Chambers v. Montgomery*, 411 Pa. 339, 192 A. 2d 355.

For many years I have advocated and urged trial Courts to state their reasons for granting or denying a new trial. However, I believe that where a new trial is granted by the trial Judge or lower Court because of an excessive verdict, this should not be mandatory. If a trial Court gives the reasons which induced it to make the Order it did, this would undoubtedly enable an appellate Court to more intelligently analyze and better judge the lower Court's decision. However, in many cases this would likely expose the trial Judge to personal hostility, because oftentimes he would have to state, as the reason for his Order, that he did not believe the plaintiff or the defendant or one or more of the witnesses, or that such-and-such witness seemed to be confused, or that he (or they) was inexperienced or not convincing. While this would, I repeat, greatly aid an appellate Court, we must remember when we come to consider the question of an abuse of discretion that a trial Judge sees and hears the witnesses and, therefore, is in a far better position than an appellate Court to form a fair and just opinion on the point of excessiveness of the verdict.

Even more important, the Majority's reversal of the lower Court's Order in this case, "because the jury's verdict was fully supported by the evidence," does not fall within the well-established legal principle which the Majority itself reiterates, i.e., "that the grant or

refusal of a new trial . . . is peculiarly within the discretion of the trial court . . . ."

I would therefore affirm the Order of the lower Court which granted a new trial limited solely to the question of damages.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SCAIFE COMPANY, a Pennsylvania corporation, Respondent v. ROCKWELL-STANDARD CORPORATION, a Pennsylvania corporation, Petitioner.	Nos. 41 and 43 March Term, 1970

Appeals from the Order of the Court of Common Pleas Civil Division of Allegheny County, Pennsylvania, at No. 3342, July Term, 1960.

PETITION FOR REARGUMENT
Filed December 30, 1971

To the Honorable Justices of said Court:

Rockwell-Standard Corporation, petitioner, by its attorneys, John C. Bane, Jr., Gilbert J. Helwig, J. Tomlinson Fort and Reed Smith Shaw & McClay, hereby respectfully requests this Honorable Court to grant it a rehearing for the following reasons:

1. Petitioner was appellant at No. 41 March Term, 1970, and Scaife Company, respondent, was appellant at No. 43 March Term, 1970.

2. These appeals were argued on December 1, 1970, and on December 20, 1971 this Court (per Jones, J.) filed its opinion affirming, as modified, the judgment of the court below and remanding the record with in-

structions to reinstate the jury's verdict. Chief Justice Bell filed a dissenting opinion. Mr. Justice Cohen did not participate in the decision of the case. Mr. Justice Pomeroy did not participate either in the consideration or the decision of this case. A copy of the two filed opinions is attached hereto as Exhibit A.

3. In its opinion a majority of this Court held that there was sufficient evidence of fraudulent misrepresentation before the jury to justify its verdict in favor of respondent and that, as to damages, the jury's verdict in the amount of $1,200,000.28, damages plus interest, was supported by the evidence.

4. Petitioner's sole argument is directed towards the action of this Court in holding that the court below abused its discretion in finding that the jury verdict of $1,200,000.28 was excessive and ordering the grant of a new trial limited solely to damages after respondent failed to file a remittitur in the amount of $756,001.28.

5. The majority opinion acknowledges the well-recognized principle that the grant of a new trial because of excessiveness of the verdict is peculiarly within the discretion of the trial court and will not be reversed unless an error of law has been committed or that discretion has been abused. This Court has held countless times that the trial judge, who hears and sees the witnesses and receives the physical evidence, is in a far better position than an appellate court, reading a cold record, to evaluate the demeanor and credibility of the witnessess and the weight to be given particular items of evidence.

6. The majority recognizes "the difficult task encountered by an appellate court in reviewing the record when a trial court merely assigns conclusory statements—'interests of justice,' 'shocks the court's conscience' and 'substantial justice.'" The court further states that it has attempted to discourage this practice on the grounds that an appellate court does not have the "opportunity of intelligently determining if an abuse of discretion occurred" unless the lower court gives its reasons for a conclusory statement. *Hilliard v. Anderson,* 440 Pa. 625, 271 A.2d 227 (1970). The majority adds "the 'excessive verdict' conclusion to that list of judicial statements requiring additional, supporting reasons." (Opinion, p. 10).

7. In granting the new trial, the court below stated, without supporting reasons, its conclusion that the jury's verdict had been excessive.

8. Despite this Court's sound and clearly enunciated policy, the majority has found, without the benefit of the supporting reasons of the lower court, that such court abused its discretion in finding that the jury verdict was excessive.

9. This action by the majority penalizes petitioner because of the lower court's failure to follow the Supreme Court's policy that conclusory statements of a lower court require supporting reasons.

10. This action severely prejudices petitioner's rights and amounts to a denial of property without due process of law. When this Court has before it only the cold record and has not had the benefit of actually

hearing and seeing the witnesses testify, it must be considered violative of the Due Process Clause for this Court to reverse the order of the court below without knowing the reasons for that court's action.

11. Remanding the record so that the court below can properly perform its obligations is consistent with the proper exercise of this Court's administrative powers.

12. On numerous occasions this Court has held that it is required to remand the record to the lower court for a statement of reasons when the lower court has acted without giving a rationale for such action. *Mallory's Estate,* 295 Pa. 406 (1929); *Rankin v. Rankin,* 224 Pa. 514 (1909); 9 Standard Pennsylvania Practice, Ch. 40 §154. Federal appellate courts, including the United States Supreme Court, have followed the policy of remanding the case to the trial court, if there has been an inadequate explanation of the trial court's ruling. *Commissioner v. Duberstein,* 363 U.S. 278 (1960); 5A *Moore's,* Federal Practice §52.06 (2), p. 2718.

13. If the court below has reasonable grounds for its order (and it must be so assumed), this court under its own policy, must affirm that order. In a case in which the facts are disputed and credibiliy is an issue, this Court can not in the interests of justice assume that the lower court could not set forth any reason for its action which would not constitute an abuse of discretion.

WHEREFORE, petitioner respectfully requests that this Court grant reargument limited to the question whether the Due Process clause and proper administra-

tion of the court system require that the record be remanded so that the court below can specify its reasons for finding the verdict excessive.

Respectfully submitted,

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J. TOMLINSON FORT
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IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 41, 43 March Term, 1970

SCAIFE COMPANY, a Pennsylvania Corporation v. ROCKWELL-STANDARD CORPORATION, a Pennsylvania Corp., Appellant	No. 3342 July Term, 1960

Appeal from the Order of August 4, 1969 of the Court of Common Pleas, Civil Division of the of the County of Allegheny
Certified from the Record

December 30, 1971 Petition for Reargument, filed.

Order

"January 26, 1972

Petition denied.

Per Curiam"

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court at Pittsburgh, Pa. this 20th day of April, 1972.

HELEN D. STEELE
Deputy Prothonotary

IN THE

Supreme Court of the United States

October Term, 1972.

No. 71-1367.

ROCKWELL-STANDARD CORPORATION,
Petitioner,

v.

SCAIFE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION AND APPENDIX.

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INDEX.

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	1
Statute Involved	1
Statement of the Case	2
Reasons for Denying the Writ	3
1. There Are No Special or Important Reasons for Granting the Writ	3
2. The Question Was Not Timely Raised Below	4
3. The Decision Below Is Clearly Correct	6
Conclusion	8
Certificate of Service	9
Appendix—Pages 34-39 of Scaife Company's Brief as Appellant in the Supreme Court of Pennsylvania	1a

TABLE OF CASES AND OTHER AUTHORITIES CITED.

Cases:

	Page
American Surety Co. v. Baldwin, 287 U. S. 156 (1932)	5
Beal v. Reading Company, 370 Pa. 45 (1952)	6
Bowe v. Scott, 233 U. S. 658 (1914)	6
Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co., 382 U. S. 423 (1966)	8
Burlington Truck Lines, Inc. v. United States, 371 U. S. 156 (1962)	7
Chicago, Rock Island & Pacific Railway Company v. Cole, 251 U. S. 54 (1919)	6
Chaunt v. United States, 364 U. S. 350 (1960)	8
Craig v. Kline, 65 Pa. 399 (1870)	6
Hanson v. Denckla, 357 U. S. 235 (1958)	5
Herndon v. Georgia, 295 U. S. 441 (1935)	5
Herron v. Southern Pacific Company, 283 U. S. 91 (1931)	6
Hilliard v. Anderson, 440 Pa. 625 (1970)	7
National Labor Relations Board v. Metropolitan Life Insurance Co., 380 U. S. 438 (1965)	7
Radio Station WOW, Inc. v. Johnson, 326 U. S. 120 (1945)	5
Secretary of Agriculture v. United States, 347 U. S. 645 (1954)	7
Spangler v. Helm's New York-Pittsburgh Motor Express, 396 Pa. 482 (1959)	4, 7

Constitutions:

United States Constitution, Amendment XIV, Section 1	5, 8
Pennsylvania Constitution, Article I, Section 9	5

Rules:

Rule 19(1)(a) of the Supreme Court Rules	4

OPINION BELOW.

The Opinion of the Supreme Court of Pennsylvania is reported at 446 Pa. 280, 285 A. 2d 451.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

When, pursuant to its long-standing and well-known procedure for review of a trial court's ruling that a jury's verdict is excessive, the highest court of a State determines, after review of the record, that the jury's verdict was supported by the evidence and orders reinstatement of that verdict, has the defendant been denied due process of law?

STATUTE INVOLVED.

The pertinent provision of the United States Constitution is set forth in the Petition.

STATEMENT OF THE CASE.

The procedural history of Scaife Company's appeal is adequately set forth in the Petition. Response to petitioner's argumentative characterization, at page 5 of the Petition, of the Pennsylvania Supreme Court's decision appears at Sections 1 and 3, *infra*. Response to petitioner's contention at page 5 of the Petition that its federal due process claim was timely raised below appears at Section 2, *infra*.

REASONS FOR DENYING THE WRIT.

1. There Are No Special or Important Reasons for Granting the Writ.

A properly instructed jury, which had ample opportunity to assess the credibility of every witness whose testimony related to damages, found that petitioner's fraudulent misrepresentations in the course of selling a business to respondent caused economic damage to respondent in the amount of $1,200,000.28. After concluding without explanation that the damages found by the jury were excessive, the trial court *en banc* ordered a new trial on damages unless respondent accepted a substantial reduction in the damages found by the jury.

When respondent appealed from that order, the Pennsylvania Supreme Court was forced to review the entire record because the lower court had not elaborated its reasons for concluding that the jury's findings were wrong. The Pennsylvania Supreme Court did so, and held:

> "It is our opinion that the jury's verdict is fully supported by the evidence and should be reinstated." (App., *Petition*, p. 45a).

In order to avoid the necessity of reviewing an entire record in future cases, the Court also instructed lower courts that in the future they should explain fully why they believe a jury's verdict is excessive (App., *Petition*, pp. 42a-43a).

Petitioner now contends that the Pennsylvania Supreme Court denied it due process because it did not remand the instant case to the lower court for such an explanation. But the Pennsylvania Supreme Court is the final judge of the sufficiency of evidence pertaining to damages. It has already reviewed the record and found that the evidence fully supported the jury's verdict. To require

that this case be remanded to the court *en banc* for an explanation, and that the record then be returned to the Pennsylvania Supreme Court for another review of the record, would sanction an exercise in futility not required by the principles of due process.

Furthermore, the Pennsylvania Supreme Court's decision was made in an action which involves only the determination of the instant parties' rights under Pennsylvania common law principles governing a defendant's liability for fraudulent misrepresentations made in the sale of a business. The order requiring reinstatement of the verdict was one of a number of similar orders by which the Pennsylvania Supreme Court has enforced Pennsylvania rules setting forth the proper roles of judge and jury in trials in its courts. E.g., *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482 (1959).

The Pennsylvania Supreme Court's decision rested solely on matters of state law. That Court construed no federal statute and ruled on no other federal claims. In short, there is no special and important reason that that Court's decision should be reviewed by this Court, and the Writ should therefore be denied. See, e.g., Rule 19(1)(a) of the Supreme Court Rules.

2. The Question Was Not Timely Raised Below.

In its appeal from the trial court's determination that the jury's verdict was excessive and from its award of a new trial on the question of damages, Scaife Company clearly and unequivocally requested the Pennsylvania Supreme Court "to reinstate the verdict of the jury", and cited in its Brief as Appellant the Pennsylvania authorities in support of that relief. (App., *Brief in Opposition*, 1a-6a.) The question whether such relief would violate the principles of due process thus became an issue

at the outset of the proceedings on Scaife Company's appeal.

Furthermore, the relief requested was not novel: Scaife Company simply asked the Pennsylvania Supreme Court to follow its standard procedure for correcting a trial court's erroneous cancellation of a jury's verdict on the ground that it is excessive.

Petitioner thus had ample warning that if the Pennsylvania Supreme Court decided that the trial court had erred in finding the jury's verdict excessive, the apropriate relief would be to order reinstatement of the jury's verdict. It had ample opportunity to raise its claim that such relief would violate due process in the Briefs and Oral Argument it submitted to the Pennsylvania Supreme Court as Appellee. Nonetheless, petitioner did not raise its due process claim until after the Pennsylvania Supreme Court had granted Scaife Company the relief requested.

By virtue of its decision to defer presenting its due process claim until after the Pennsylvania Supreme Court had decided Scaife Company's appeal, petitioner failed to preserve that point for review by this Court, and the Writ should be denied. *Hanson v. Denckla*, 357 U. S. 235, 243-244 (1958); *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 128 (1945); *Herndon v. Georgia*, 295 U. S. 441 (1935); *American Surety Co. v. Baldwin*, 287 U. S. 156, 162-164 (1937).

Moreover, in its Petition for Reargument to the Pennsylvania Supreme Court petitioner merely asserted that reinstatement of the jury's verdict by that Court "must be considered violative of the Due Process Clause" (App., *Petition*, p. 52a). By failing to specify whether its claim was based on the Due Process Clause of the Fourteenth Amendment to the United States Constitution or on the Due Process Clause of the Constitution of the Commonwealth of Pennsylvania (Art. I, Section 9, Pennsylvania

Constitution),[1] petitioner failed to present adequately to the Pennsylvania Supreme Court the federal due process claim it attempts to raise now. For this reason alone the Writ should be denied. *Bowe v. Scott*, 233 U. S. 658, 664-665 (1914).

3. The Decision Below Is Clearly Correct.

It is true, as petitioner urges, that in common with the federal system Pennsylvania law grants its trial judges the power to set aside or reduce a jury's verdict on grounds that it is excessive. But it has long been clear that in civil actions to enforce claims arising solely under state law, the United States Constitution permits a state to limit or even to eliminate altogether its trial judges' powers over a jury's decision. E.g., *Chicago, Rock Island & Pacific Railway Company v. Cole*, 251 U. S. 54 (1919). See, e.g., *Herron v. Southern Pacific Company*, 283 U. S. 91, 93 (1931).[2]

In Pennsylvania, the circumstances under which a trial judge may set aside or reduce a jury's verdict are narrowly circumscribed. And when the trial court interferes with a jury's verdict in the absence of those circumstances, his decision is subject to review and correction by the Pennsylvania Supreme Court. E.g., *Beal v. Reading Company*, 370 Pa. 45, 49 (1952). In the instant case the Pennsylvania Supreme Court, after reviewing the record, found that the jury's verdict was fully supported by the evidence, and that none of the conditions which under Pennsylvania law

1. See, *Craig v. Kline*, 65 Pa. 399, 413 (1870).

2. For this reason, none of the cases cited by petitioner in Section 1 of its Petition support granting the Writ. In each of the cases cited by petitioner this Court was either discussing the powers of federal judges over a jury's decision or determining the appropriate role of state judges in actions to enforce claims arising under federal statutes.

authorize interference with a jury's verdict were present. Accordingly, it ordered reinstatement of the verdict. In so doing it simply followed its well known procedure for disposing of such a case.

As had been stated by the Pennsylvania Supreme Court many times prior to its decision in the instant case, when the trial court's cancellation of a jury's verdict is challenged on appeal, the Pennsylvania Supreme Court must "review the record to determine whether the cancellation of a jury's verdict is warranted under all the circumstances of the case." *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482, 488 (1959). After such review, if the Supreme Court determines that cancellation of the jury's verdict was unwarranted, the appropriate disposition is to remand with instructions to reinstate the jury's verdict. E.g., *Spangler v. Helm's New York-Pittsburgh Motor Express, supra; Hilliard v. Anderson*, 440 Pa. 625 (1970).

In the present case the Pennsylvania Supreme Court, after review of the record, determined that the jury's verdict was well within the amount of damages established by evidence of the economic effects of the petitioner's fraud. This was obviously a decision within the competence and power of that Court.[3] That Court's order requiring rein-

3. Every case on which petitioner bases its assertion to the contrary arose in circumstances far different than those presented here. The Pennsylvania Supreme Court was not, for example reviewing the unexplained decision of a Federal Administrative agency charged with the interpretation and application of a Federal Statute. Nor was it reviewing the decision of a lower Federal Court applying a Federal Statute in which the stated ground for decision was held by the United States Supreme Court to be an erroneous application of the statute. Under such circumstances, as the cases on which Petitioner relies make clear, this Court will frequently remand such a decision to the pertinent Federal agency for explanation of its challenged decision. *Secretary of Agriculture v. United States*, 347 U. S. 645 (1954); *National Labor Relations Board v. Metropolitan Life Insurance Co.*, 380 U. S. 438 (1965); *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156 (1962). Or it will remand to the lower Court for further proceedings applying the statute as inter-

statement of the verdict, returned by a properly instructed jury which had ample opportunity to weigh any credibility problems even arguably presented by the evidence pertaining to damages, in no way violates the principles of the Due Process Clause of the Federal Constitution.

CONCLUSION.

For the foregoing reasons respondent, Scaife Company, respectfully requests that the Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania be denied.

Respectfully submitted,

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3. (Cont'd.)

preted by this Court. *Chaunt v. United States*, 364 U. S. 350 (1960); *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co.*, 382 U. S. 423 (1966). Actually, these decisions are not based on the requirements of the Due Process Clause of the United States Constitution. They are, instead, based on this Court's role in enforcing the administrative and judicial procedures established by Congress for the application of federal statutory policies.

Certificate of Service.

I hereby certify that on this 25th day of May, 1972, three copies of the Brief of Respondent in Opposition and Appendix were mailed, postage prepaid, to Gilbert J. Helwig, Reed, Smith, Shaw & McClay, Union Trust Building, Pittsburgh, Pennsylvania 15230, Counsel for Petitioner. I further certify that all parties required to be served have been served.

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May 25, 1972

Appendix.

EXCERPT FROM BRIEF OF APPELLANT, SCAIFE COMPANY, IN THE SUPREME COURT OF PENNSYLVANIA.

* * *

C. The Lower Court's Substitution of Its Opinion of the Damage Suffered by Scaife for That of the Jury Without Any Explanation and Its Order That the Plaintiff Re-litigate the Question of Damages Unless Plaintiff Accept a Reduction of That Verdict Was Arbitrary and a Clear Abuse of Discretion.

The court *en banc* after a careful analysis of the trial judge's charge ruled that he correctly instructed the jury about every element of damages recoverable by Scaife (1504a-1508, *Opinion*). The court ruled further that the formula the jury was instructed to apply was a correct statement of the damages recoverable by a victim of fraud. Included in the trial judge's formula, and expressly approved by the lower court, were: (1) the amount paid for equipment and inventory transferred less actual value; (1506a, *Opinion*) (2) the loss caused by the effect of the defective gas furnace on the reputation and sales of the Timken Silent Automatic product line; (1506a, *Opinion*) (3) the amounts expended by Scaife in its efforts to correct the defect and to reduce or reverse the losses caused by the defect; (1507a, *Opinion*) (4) interest upon such part of the claim as the jury found was certain, to be calculated from the time the amount awarded was judged by the jury to have been a sum certain (1508a, *Opinion*).

The lower court further acknowledged that because the amount of damages were not capable of determination with "mathematical exactness", the final decision on these elements was a matter for the jury (1506a-1507a, *Opinion*). Parenthetically, it is important to note that in this case the jury was given precise figures setting out clearly the outer limits of damages flowing from Rockwell's fraud. The jury was not required to construct from whole cloth a value for such intangible damages to a plaintiff as "pain and suffering." The jury here was given both dollar amounts and testimony and documentary evidence establishing the basis on which the jury could determine that some, and even all, the dollars lost were the direct result of Rockwell's fraud. That the jury conscientiously (and conservatively) applied the formula given by the judge to the evidence submitted to it is apparent. Its damages verdict, $810,811.00, is well within the maximum amount of loss proved by plaintiff: $1,738,203.00. That was the amount of the operating losses suffered by plaintiff in operating the Division during the period it was attempting to market the Division's product line and to correct the defective gas furnaces.

Against this background, the action of the lower court in setting aside the jury's verdict and requiring relitigation of damages cannot be sustained. The court did not explain in what respect it felt the jury's verdict was defective. While trial courts are allowed significant powers and discretion by this court, their discretion is not unlimited. The lower court's failure to explain in what way or ways it felt the jury's verdict to be unsatisfactory alone violated the clear mandate of this court. *Bellettiere v. Philadelphia*, 367 Pa. 638,

644 (1951); *Beal v. Reading Company*, 370 Pa. 45, 49 (1952). The lower court's failure to specify how the jury's verdict was wrong imposes on this court the duty "to review the record to determine whether the cancellation of a jury's verdict is warranted under all the circumstances of this case." *Spangler v. Helms New York—Pittsburgh Motor Express*, 396 Pa. 482, 487-488 (1959). In *Spangler*, this Court reversed the trial court's grant of a new trial because of an excessive verdict and ruled that the jury's verdict was not, in fact, excessive.

Having ruled that no error was made in the admission of evidence justifying an award of $1,738,203, there was no basis for the court's statement that "it is conceivable that plaintiff suffered a legally compensable harm in excess of the verdict but it has failed to produce competent evidence to prove this." (1508a *Opinion*) The court's subsequent statement that "[b]ased on the record which we have before us we are of the opinion that the jury's verdict is excessive" (1508a, *Opinion*), is not explained by it, and finds no support from the record.

By overturning the jury's verdict without explanation the court in effect was acting as a jury. In so doing, it plainly abused its powers as a court *en banc*, whose function is to correct errors in the conduct of a trial. This court's recent analysis of its role on review is equally applicable to the role of the trial court:

> "It is not the function of an appellate court to pass upon the credibility of witnesses or to act as the trier of facts, and we will not substitute our judgment for that of the fact-finding jury, if there

> is sufficient evidence of record to support the jury's findings of fact [Citations]. Even though we might be of the opinion that had we been the trier of fact we would have reached a contrary result, nevertheless, we will not set aside the findings of fact of a jury implicit in its verdict which are evidentiarily supported of record and where there was no abuse of discretion and where no error of law has been committed [Citations]." *Burbage v. Boiler Engineering & Supply Company, Inc.*, 433 Pa. 319, 323-324 (1965) [Affirming denial of new trial.]

Of course, a trial court has both the power and the duty to revise verdicts so clearly excessive that the jury must have been swayed by "passion, partiality, prejudice or corruption." See, *e.g.*, *Amey v. Erb*, 296 Pa. 561, 567 (1929). But in the instant case, the lower court did not and could not find such a basis for the jury's verdict. The wrong done Scaife was an economic wrong, the damages measurable by non-emotive economic effects proved by substantial competent evidence.

A trial court also must correct verdicts excessive because the jury was improperly instructed as to the measure of damages and may effect such correction by reducing the verdict by the excess awarded pursuant to the erroneous portion of the charge: *Skoda v. West Penn Power Company*, 411 Pa. 323, 333-338 (1963). Or it may, on this ground, require re-litigation of the question of damages. *Tilghman v. Dollenberg*, 418 Pa. 604 (1965) [Claim based on fraud, affirming award of a new trial on damages because of improper jury charge on the measuring of damages]; *Hahn v. An-*

drews, 182 Pa. Super. 338 (1956) [Breach of contract, ordering re-litigation of damages question because trial court erroneously excluded evidence relating to lost profits.]. But the lower court expressly did not and indeed, could not base its decision on this ground.

It is also clear that when the measure of damages can be stated with precision to the jury and when the evidence clearly establishes the maximum amount which plaintiff can be entitled to recover, the trial court may revise a verdict obviously in excess of the maximum so established, and for that reason manifestly against the weight of the evidence. *Swartz v. Smokowitz*, 400 Pa. 109, 112 (1960) [Affirming new trial on damages in wrongful death and survival action]; See, *Eisert v. Jones*, 408 Pa. 3, 78 (1962) [Denial of new trial affirmed because, inter alia, record did not disclose "capricious disregard by the jury of persuasive testimony."]. But this power is necessarily very narrowly circumscribed and cannot be exercised unless the verdict is so out of proportion to the amount proved that it is apparent that the jury misconceived the law or the evidence. *Spangler v. Helm's New York-Pittsburgh Motor Express*, 396 Pa. 482 (1959) [Reversing grant of new trial based on exeessiveness of the verdict.]

Since none of the conditions authorizing a court to revise a jury's verdict and to require re-litigation of damages have been met in the instant case, the lower court's award of a new trial on damages was erroneous and must be reversed.

VI. CONCLUSION.

For the foregoing reasons, Scaife Company respectfully requests this Honorable Court to reverse the Lower Court's grant of a new trial on the question of damages and to reinstate the verdict of the jury.

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